No. 05-750

In The

Supreme Court of the United States

SHAWN MARCUS CUMMINGS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Sixth Appellate District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Sole Question: Was Petitioner denied Fourteenth Amendment Due Process of Law when the trial judge failed to consider a deferred adjudication before finding Petitioner guilty and sentencing Petitioner?

PARTIES TO THE PROCEEDING

Petitioner is Shawn Marcus Cummings, 8670 FM 1649, Gilmer, TX 75645, represented by Hough-Lewis Dunn, 201 E. Methvin Street, Suite 102, P.O. Box 2226, Longview, Texas 75606.

Respondent is the State of Texas, represented by Hon. Greg Abbott, Attorney General of Texas, Office of the Attorney General of the State of Texas, 209 West 14th Street, Price Daniel Sr. Building, Austin, Texas 78701.

Respondent was represented in the Court below by Hon. William Jennings, Criminal District Attorney of Gregg County, Gregg County Courthouse, 100 East Methvin Street, Third Floor Suite 333, Longview, Texas 75601.

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PETITION FOR WRIT OF CERTIORARI

Shawn Marcus Cummings, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals, Sixth Appellate District of Texas at Texarkana, entered in the above-entitled case on March 23, 2005.

OPINIONS BELOW

The opinion of the Court of Appeals, Sixth Appellate District of Texas at Texarkana, entered on March 23, 2005, of which review is requested in this petition, is reported at 163 S.W.3d 772, and is reprinted in the separate Appendix to this petition (*infra*, App. 1-App. 9).

The Court of Criminal Appeals of Texas denied a petition for discretionary review without written opinion in Cause No. PD-0730-05, on September 14, 2005, and the Notice of that denial is reprinted in the separate Appendix to this petition (*infra*, App. 15).

STATEMENT OF JURISDICTION

The judgment of the Court below (*infra*, App. 1-App. 9) was entered on March 23, 2005. Rehearing was timely sought and overruled without written opinion on April 13, 2005. A petition for discretionary review was filed in the Court of Criminal Appeals of Texas but was denied on September 14, 2005, without written opinion (*infra*, App. 15). No motion for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1957(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, §1.

Article 1, §19 of the Texas Constitution, provides, in relevant part: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunity, or in any manner disenfranchised, except by due course of the law of the land." TEX. CONST. art. 1, §19.

The relevant provisions of the Texas Code of Criminal Procedure, the Texas Penal Code, and the Texas Rules of Appellate Procedure are reproduced in the separate Appendix to this petition (*infra*, App. 16-App. 18).

STATEMENT OF THE CASE

Petitioner entered an open plea of guilty to the trial court to the third degree felony of theft.[1] There was no plea bargain concerning punishment. Having no prior felony convictions, Petitioner was eligible under Texas law for a sentence of deferred adjudication.[2] However, the trial court never considered that possibility. Instead, the trial court proceeded to find Petitioner guilty and sentenced him to seven years imprisonment (*infra*, App. 11-App. 14).

[1] TEX. PENAL CODE, §31.03 (*infra*, App. 17-App. 18); TEX. PENAL CODE, §12.34 (*infra*, App. 17).

[2] TEX. CODE CRIM. PROC. Art. 42.12, §5 (*infra*, App. 16).

On appeal to the Court of Appeals, Sixth Appellate District of Texas, sitting at Texarkana, Petitioner contended that the trial court committed a clear legal error, violating his federal Due Process rights. In its opinion dated March 23, 2005, *Cummings v. State*, 163 S.W.3d 772 (Tex. App. – Texarkana, 2005, pet. ref'd), that Court ruled (1) that Petitioner had not preserved that error at trial but then (2) proceeded to analyze the error and held that no error was committed (*infra*, App. 8). Although Petitioner sought review of that opinion from Texas' court of last resort for criminal matters, the Court of Criminal Appeals of Texas denied review without written opinion (*infra*, App. 15). Therefore, the Court of Appeals, Sixth Appellate District of Texas at Texarkana, has decided a matter that implicates Fourteenth Amendment Due Process of Law.

Initially, the Court below held that Petitioner waived error because there was no objection at trial and no mention of the error in Petitioner's motion for new trial. The court cited to TEX. R. APP. P. 33.1(a), and to *Teixeira v. State*, 89 S.W.3d 190, 192 (Tex. App. – Texarkana, 2002, pet. ref'd) for the principle that, in order to preserve error on appeal that the trial court failed to consider the full range of punishment, the error, if any, had to be raised at the trial court level. (See, *infra*, App. 18.)

However, instead of summarily affirming the trial court's judgment, the court below analyzed the record and concluded that there was no error committed by the trial court. In doing so, the court below expressly relied upon *Davis v. State*, 125 S.W.3d 734 (Tex. App. – Texarkana, 2003, no pet.), which holds: "A trial court's arbitrary refusal to consider the entire range of punishment available for the offense does constitute a denial of due process (cit. omitted)." *Id.*, at 736.

Since the error was addressed by the Court below, the error is properly before this Court for consideration. *Whitfield v. Ohio*, 297 U.S. 431, 436 (1936); *Erie Railroad Company v. Purdy*, 185 U.S. 148, 152-153 (1902). Moreover, under Fourteenth Amendment Due Process analysis, (this Brief, *infra*, pp. 8-9) this Court's jurisdiction is properly invoked.

Petitioner was denied Fourteenth Amendment Due Process of Law because the trial judge categorically refused to consider the complete range of punishment. In Texas there are two types of adult community supervision or probation established under TEX. CODE CRIM. PROC., art. 42.12: adjudicated community supervision under §3 of that statute and deferred adjudication community supervision under §5 (*infra*, App. 16). Even if a defendant successfully completes the term of community supervision under §3 without revocation and incarceration, he or she still carries the stigma of a conviction and the disabilities associated with that conviction. That is not the case with deferred adjudication. Upon successful completion of community supervision under §5 deferred adjudication, "the judge shall dismiss the proceedings against the defendant and discharge him . . . *a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense . . .* " TEX. CODE CRIM. PROC. art. 42.12, §5(c) (emphasis added), (*infra*, App. 17).

The Court below nowhere in its opinion hinted at the qualitative, substantial, difference in the consequences of the successful completion of those two types of adult community supervision. It reasoned that, because deferred adjudication was "a form of community supervision, it is not necessary for a trial court to explain all possible forms

or conditions or [sic] community supervision in order to properly admonish a defendant in accordance with Article 26.13" (*infra*, App. 5-App. 6). For the reasons given, *infra*, that opinion is in error, and that error is at once the bedrock of the faulty perception found in the opinion of the Court below and the buttress to the trial court in its unconstitutional denial of federal Due Process of Law.

REASONS FOR REVIEW

The Court below relied upon an imperfect analysis of (1) the duties of the trial court when it takes a guilty plea and proceeds to sentencing and (2) the rights of a defendant that are at stake in that situation. TEX. CODE CRIM. PROC. art. 26.13(a) states, in relevant part:

> (a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
>
> (1) the range of the punishment attached to the offense . . .

The trial court did not follow that statutorily-mandated duty. Instead, there was this exchange between the trial court and Petitioner:

> THE COURT: Upon your plea of guilty *I must find you guilty.* I cannot find you not guilty if you plead guilty; do you understand that?
>
> THE DEFENDANT: Yes, I do, your honor.
>
> THE COURT: Once I make that finding of guilt, the law requires that I assess your punishment to confinement in the Institutional Division of the Texas Department of Criminal Justice,

> that's the state penitentiary, for a period of not less that two years, nor more than ten years.
>
> In addition to any period of confinement, I may impose a fine of up to $10,000. You understand that is the range of punishment fixed by law for this type of offense?
>
> THE DEFENDANT: Yes, I do.

(*infra*, App. 19-App. 20; emphasis added)

As the plea continued, the trial court then told Petitioner that, even though Petitioner had filed a request for probation, i.e., community supervision, there was no obligation that it be granted (*infra*, App. 20). Yet, nowhere in the plea discussion was the phrase or expression "deferred adjudication" used by the trial court. On the plea of guilty, "I must find you guilty," the trial court said; there was no consideration of the possibility of a deferral of judgment. The trial court gave voice to no alternative.

Finding a defendant guilty and entering a deferred adjudication of guilt are non-inclusive categories for disposing of a criminal case under Texas law. If they were expressed by using Venn diagrams, the circle around "guilty" would never touch or intersect the circle around "deferred adjudication."

The reasoning of the Court below ignores two things: first, it ignores the fact that the Texas statute expressly sets up two very different types of community supervision in TEX. CODE CRIM. PROC. art. 42.12: one in §3 and quite another in §5. The Court of Criminal Appeals of

Texas discussed those differences in *McNew v. State*, 608 S.W.2d 166, 172 (Tex. Crim. App. 1978).[3]

Additionally, and just as importantly, the Court below ignores those matters that lie at the very core of the distinction between the two types of community supervision, namely, through deferred adjudication, the defendant can avoid the disabilities of a felony conviction. Under Texas law a convicted felon cannot vote,[4] cannot hold public office,[5] and cannot serve on juries.[6] One other civil right that is potentially affected by felony conviction is the right to bear arms. See U.S. CONST. amend. II which states, in pertinent part: " . . . the right of the people to keep and bear arms shall not be infringed." Under Texas law a convicted felon cannot possess a firearm. TEX. PENAL CODE, §46.04.

A defendant is denied Fourteenth Amendment Due Process of Law if sentenced by a trial court who does not consider the entire range of punishment available under Texas law. Texas cases are consistent on that point. See *Teixeira v. State, supra*, and *Davis v. State, supra*, and cases cited therein.

One of the fundamental, systemic, or structural rights of an accused is the assurance of a fair, unbiased, judge.

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[3] In reviewing the statute, *McNew* refers to TEX. CODE CRIM. PROC. art. 42.12, §3d(a). The numbering of sections changed with recodification in 1989; previously TEX. CODE CRIM. PROC. art. 42.12, §5 was §3d(a). See discussion in *Dillehey v. State*, 815 S.W.2d 623, 624, n.1 (Tex. Crim. App. 1991).

[4] TEX. CONST. art. 6, §1.

[5] TEX. GOVT. CODE, §141.001(a)(4).

[6] TEX. CODE CRIM. PROC. art. 35.12(2), art. 35.16(a)(2), and art. 35.19.

Arizona v. Fulminante, 499 U.S. 279, 294 (1991); *Rose, Warden v. Clark*, 478 U.S. 570, 577 (1986), each citing to *Tumey v. Ohio*, 273 U.S. 510 (1927), which based its rationale upon Fourteenth Amendment Due Process, *id.* at 523. See also *Mendez v. State*, 138 S.W.3d 334, 340 (Tex. Crim. App. 2004) (citing to *Johnson v. United States*, 520 U.S. 461, 468-69 (1997), which, in turn, relied upon *Arizona v. Fulminante, id.*) Such a failing in the conduct of a trial is an error that cannot be waived and can be raised or the first time on appeal. *Mendez, id.*

More recently, the Court of Criminal Appeals of Texas granted relief in habeas corpus when the applicant complained that his trial judge did not consider the full range of punishment in revoking his community supervision and sentencing him to twenty years in prison. *Ex parte Brown*, 158 S.W.3d 449 (Tex. Crim. App. 2005). The Court in a *per curiam* decision held: "Texas trial courts have wide discretion in determining the proper punishment in a revocation hearing, but due process guarantees a defendant the right to a hearing before a 'neutral and detached hearing body'" (citing to *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)). *Id.* at 454.

The failure to consider deferred adjudication may, in fact, show at least a tendency on the part of the trial court in the direction of a lack of impartiality, if it does not, indeed, demonstrate it. Perhaps that is why the Texas courts in *Ex parte Brown*, *Davis*, and *Teixerira* hold that there is a denial of Due Process of Law when the trial court fails to consider the full range of punishment, although they remain cryptically silent on the rationale behind their opinion. TEX. CONST. art. 1, §19, provides its own guarantee of "due course of the law of the land" which is carried forward in the Texas statute TEX. CODE CRIM.

PROC. art. 1.04 (*infra*, App. 16). Yet the Texas courts do not solely employ the language of the Texas Constitution or statute; instead, U.S. CONST. amend. XIV, §1 also provides the touchstone for their Constitutional analysis.

When the trial judge does not consider the full range of punishment, is it, then, a reflection of the lack of impartiality of the magistrate? Does it show that the sentencing judge has failed to consider what the law requires him or her to consider? Has he or she not, perforce, failed to follow the obligations of the oath of office? And does it not, in its effect on a defendant, reveal that a certain option or options were foreclosed, put off, and never available to the defendant in the disposition of his case, when he had entrusted his fate and future to the sentencing magistrate? Petitioner would answer those questions in the affirmative. When someone is categorically denied the opportunity to avoid the loss of valuable civil rights, when that option is *ab initio* foreclosed and never considered by the trial court, then the very system itself is flawed, and Fourteenth Amendment Due Process is denied. *Arizona v. Fulminante*; *Rose, Warden v. Clark*; *Tumey v. Ohio*; *Mendez v. State*.

Petitioner contends that the practice approved by the Court below cannot withstand Constitutional scrutiny. Since the two types of community supervision have such different consequences, one cannot reasonably maintain that the "consideration" of probation implies the "consideration" of deferred adjudication, especially when the trial judge states that he is going to find Petitioner guilty upon his plea. The two types of disposition are too diverse in their consequences. A defendant who successfully completes community supervision under a deferred adjudication ultimately has no conviction, has the case dismissed,

and suffers none of the disabilities that a conviction would otherwise bring. TEX. CODE CRIM. PROC. art. 42.12, §5(c) (*infra*, App. 17). That is far different from the fate of a person who is, in fact, adjudged guilty and then placed on community supervision: though he or she may successfully complete community supervision, the stigma of conviction remains with its concomitant disabilities and loss of those civil rights noted, *supra*, holding public office, serving on a jury, voting,[7] and the right to bear arms.

Texas is not alone in having a system that distinguishes between, on the one hand, probation after a conviction and, on the other, probation without conviction, or, in some instances, a system for expunction of the conviction. Following provides a survey of some of those statutes:

Alabama: ALA. CODE tit. 15, §15-22-50 is the probation statute; but under ALA. CODE tit. 12, §12-23-5, in some cases involving a controlled substance offense, an offender may request permission from the prosecuting attorney to gain admission to a drug treatment program and have prosecution deferred.[8]

Alaska: ALASKA STAT. §12.55.080 is the probation statute; but see ALASKA STAT. §12.55.085(e), which provides: "Upon the discharge by the court without the

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[7] See, *Hayes v. Williams*, 341 F. Supp. 182 (S.D.Tex. 1972), holding that those with a felony conviction cannot vote and cannot hold public office.

[8] As to the consequences of not gaining a deferred disposition, see, *Waddy v. Davis*, 445 F.2d 1 (5th Cir. 1971), holding that a convicted felon cannot vote.

imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect."

Arizona: ARIZ. REV. STAT. §13-901 is the probation statute; ARIZ. REV. STAT. §13-912 permits the restoration of civil rights to someone who successfully completes probation and who has never before been convicted of any other felony.

Arkansas: ARK. STAT. ANN. §5-4-301 is the probation statute; ARK. STAT. ANN. §§16-93-301-303 permit a deferral of adjudication to first time offenders.

California: CAL. PENAL CODE, §1203 is the probation statute; CAL. PENAL CODE, §1203.4(a) permits deferred adjudication with a final dismissal and release "from all penalties and disabilities resulting from the offense . . ."[9]

Colorado: COLO. REV. STAT. §18-1.3-202, et seq. is the probation statute; COLO. REV. STAT., §18-1.3-101 permits deferred prosecution; COLO. REV. STAT. §18-1.3-102 permits deferred sentencing.

Connecticut: CONN. GEN. STAT. §53-29(a), is the probation statute; CONN. GEN. STAT. §53-29(b) speaks instead of a "sentence of conditional discharge" as something different from a probated sentence; which distinction is carried forward in CONN. GEN. STAT. §§53a-30, 53a-33, and 53a-34.

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[9] See, *People v. Johnson*, 285 P.2d 74, 76 (Cal. App. 3d 1955) for discussion of the process of making application to get a conviction removed. See, *Richardson v. Ramirez*, 418 U.S. 24 (1974), holding that convicted felons, even after serving their full sentence and are no longer on parole, are prohibited from voting.

Delaware: DEL. CODE ANN. tit. 11, §4204(c)(1)-(3) is the probation statute; DEL. CODE ANN. tit. 11, §4218 refers to "probation before judgment" and subsection (f) states: "Discharge of a person under this section shall be without judgment of conviction and is not a conviction for the purposes of any disqualification or disability imposed by law for the conviction of a crime."[10]

Florida: FLA. STAT. ANN. §948.01(1) states that "the court, either with or without adjudication of guilt of the defendant, [may] hear and determine the question of probation of a defendant. . . ."[11]

Georgia: GA. CODE ANN. §42-8-34 is the probation statute; GA. CODE ANN. §42-8-60 is the deferred adjudication probation statute for first offenders.[12]

Hawaii: HAW. PENAL CODE §706-620 is the probation statute; HAW. PENAL CODE §853-1 permits deferred adjudication.

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[10] See, *Ryan v. State*, 791 A.2d 742, 744 (Del. 2002), holding that a person who is discharged from probation before judgment is eligible for expungement of police and court records, since "his discharge renders him innocent as a matter of law."

[11] See, *State v. McFadden*, 772 So.2d 1209 (Fla. 2000, reh. den.), holding that where the court withholds adjudication, and the defendant successfully completes probation, there is no conviction for purposes of impeachment of a witness.

[12] See *Cottingham v. State*, 424 S.E.2d 794, 797 (Ga. App. 1992), holding that, where defendant complained on appeal that trial court refused to consider deferred adjudication at sentencing, such refusal was an abuse of discretion. Same holding in *Wnek v. State*, 586 S.E.2d 428 (Ga. App. 2003); *Jackson v. State*, 535 S.E.2d 818 (Ga. App. 2000); *Jones v. State*, 431 S.E.2d 136 (Ga. App. 1993).

Rhode Island: R.I. GEN. LAWS, tit. 12, §12-19-8 is the probation statute; R.I. GEN. LAWS, tit. 12, §12-19-19 provides for a deferred sentencing.

Tennessee: TENN. CODE ANN. §40-35-303 is the probation statute; TENN. CODE ANN. §40-35-313 provides for a deferred adjudication.[13]

Wisconsin: WIS. STAT. ANN. §973.09 is the probation statute; WIS. STAT. ANN. §973.015 permits the expunction of certain offenses upon successful completion of probation.

Since two types of disposition are available, probation with a conviction or probation without a conviction, and since each has far-reaching consequences affecting the civil rights of a defendant, a trial court has a duty under the Due Process Clause of the Fourteenth Amendment expressly to consider deferred adjudication. That is true not only in Texas but evidently in a number of other states as well.

The Court below held otherwise and thereby denied Fourteenth Amendment Due Process of Law to Petitioner.

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[13] See, *State v. Kyte*, 874 S.W.2d 631 (Tenn. Crim. 1993), holding that it is in the discretion of the court to grant or not to grant "judicial diversion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2005

APPENDIX A

OPINION OF THE COURT OF APPEALS
SIXTH APPELLATE DISTRICT OF TEXAS
AT TEXARKANA

[SEAL]

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-04-00124-CR

SHAWN MARCUS CUMMINGS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th Judicial District Court
Gregg County, Texas
Trial Court No. 30959-B

Before Morriss, C.J., Ross and Carter, JJ.
Opinion by Justice Carter

OPINION

(Filed Mar. 23, 2005)

After pleading guilty without the benefit of a negotiated plea agreement, the trial court found Shawn Marcus Cummings guilty of stealing over $20,000.00 worth of compact disks and other merchandise from the Lifeway Christian Store in Longview, Texas, and the court sentenced Cummings to seven years' imprisonment. Cummings now appeals the trial court's judgment, arguing that the trial court erred in failing to admonish Cummings concerning deferred adjudication community supervision

and thereby precluded consideration of all available sentencing options. We affirm.

I. Factual and Procedural Background

On May 21, 2004, Cummings waived a jury trial and pled guilty to the offense of theft of property valued at greater than $20,000.00 but less than $100,000.00. *See* TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2004-2005). That offense is a third-degree felony. *See* TEX. PEN. CODE ANN. § 31.03(e)(5). The punishment range for a third-degree felony is imprisonment for not less than two years nor more than ten years. TEX. PEN. CODE ANN. § 12.34 (Vernon 2003). The applicable punishment also includes a fine of up to $10,000.00. *Id.*

In connection with his guilty plea, Cummings signed several documents, including an application for probation[1] and a series of written admonishments regarding his guilty plea. The admonishments included an explanation that, by pleading guilty, Cummings would be waiving his right for ten days' trial preparation time, waiving his right to a reading of the indictment, and waiving his right to confront and cross-examine the State's witnesses. The group of documents signed by Cummings also include a stipulation of evidence that appears to track the indictment. Among these documents, however, there is no written admonishment concerning the possibility of the trial court deferring a finding of guilt and placing Cummings on

[1] The term "probation" has been replaced by the statutory term "community supervision." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 1 (Vernon Supp. 2004-2005). During this guilty plea process, the term "probation" was used.

community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (Vernon Supp. 2004-2005).

Before accepting Cummings' guilty plea, the trial court orally reviewed its standard admonishments concerning the guilty plea by advising Cummings of the specific charge, and determining that he understood the indictment. The court then further advised Cummings:

> THE COURT: Are you telling me that you fully understand, you fully comprehend the exact nature of the accusation brought against you by the indictment?
>
> [Cummings]: Yes, I do, your Honor.
>
> THE COURT: How do you plead to this indictment?
>
> [Cummings]: I'm pleading guilty, your Honor.
>
> THE COURT: Upon your plea of guilty I must find you guilty. I cannot find you not guilty if you plead guilty; do you understand that?
>
> [Cummings]: Yes, I do, your Honor.
>
> THE COURT: Once I make a finding of guilt, the law requires that I assess your punishment to confinement in the Institutional Division of the Texas Department of Criminal Justice, that's the state penitentiary, for a period of not less than two years, no more than ten years.
>
> In addition to any period of confinement, I may impose a fine up to $10,000. You understand that is the range of punishment fixed by law for this type of offense?

[Cummings]: Yes, I do.

. . . .

THE COURT: Okay. You have the right to file an application for a probated sentence. I note that you've done that. I tell you that you having filed that application, the law requires, and I will, in fact, consider it, but I'm under no duty, no obligation, no commitment to anyone to grant probation in this matter; do you understand that?

[Cummings]: Yes, I do, your Honor.

THE COURT: If probation is granted, I get to set its terms and conditions, including its length, which may be as little as two years, may be as many as ten years.

Also, if I grant probation, and I don't know whether I am or not, I could impose a special condition that you serve what we call some up-front time in the county jail, up to 90 days – well, up to 180 days in the county jail.

Do you understand the Court sets the terms and conditions of probation if probation is granted?

[Cummings]: Yes, I do, your Honor.

The court then explained the procedure in the event Cummings was charged with a violation of community supervision conditions, accepted a judicial confession of guilt, and determined that the plea was freely and voluntarily entered. Cummings reiterated his plea of guilty.

II. Failure To Consider the Full Range of Punishment

In his only point of error, Cummings contends that the trial court erred by failing to admonish him regarding the possibility of receiving deferred adjudication and that this omission ostensibly caused the trial court to fail to consider the full range of punishment. Cummings then contends he suffered harm because the trial court found him guilty without first giving both the State and Cummings the opportunity to recommend deferring a finding of guilt.

Article 26.13 of the Texas Code of Criminal Procedure requires the trial court to advise a defendant of the range of punishment attached to the offense, but does not specifically require the court to admonish the defendant concerning the possibility of deferred adjudication. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2004-2005). An admonishment concerning the possible consequences of deferred adjudication is required only "[a]fter placing the defendant on community supervision. . . . " TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a). Deferred adjudication is a form of community supervision,[2] and it is

---

[2] Article 42.12, Section 2(2) provides:

> "Community supervision" means the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period during which:
>
> (A) criminal proceedings are deferred without an adjudication of guilt; or
>
> (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part.

(Continued on following page)

not necessary for a trial court to explain all possible forms or conditions or community supervision in order to properly admonish a defendant in accordance with Article 26.13.

Here, the trial court clearly admonished Cummings as to the range of punishment, acknowledged Cummings had filed an application for community supervision, stated it would consider the application, informed Cummings that, if community supervision was granted, then the court would set the conditions, and informed Cummings of the consequences of violation of community supervision conditions. However, in this case, Cummings' complaint is that the trial court effectively refused to consider deferred adjudication probation, as evidenced by its comments.

As can be read from the text of the trial court's admonishments, the trial court did not discuss the possibility of deferring a finding of guilt and placing Cummings on community supervision. Even if that omission was erroneous. Cummings did not object nor raise the issue in his motion for new trial, which was overruled by operation of law seventy-five days after the trial court imposed Cummings' sentence. *See* TEX. R. APP. P. 21.8(a), (c).

> As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(2) (Vernon Supp. 2004-2005).

> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a).

In *Teixeira v. State,* 89 S.W.3d 190, 192 (Tex. App. – Texarkana 2002, pet. ref'd),[3] this Court explained that a trial court "denies due process and due course of law if it arbitrarily refuses to consider the entire range of punishment for an offense or refuses to consider the evidence and imposes a predetermined punishment." (citing *Granados v. State,* 85 S.W.3d 217 (Tex. Crim. App. 2002); *Johnson v. State,* 982 S.W.2d 403, 405 (Tex. Crim. App. 1998)). However, in *Teixeira*, we also emphasized for one to preserve a complaint for appeal that the trial court failed to consider the full range of punishment, the error, if any, must be

[3] *See also Teixeira v. Texas*, 540 U.S. 1188 (2004) (denying Teixeira's petition for writ of certiorari in connection with the denial of relief in his state post-conviction habeas application).

raised to the trial court. *Id.* In *Teixeira,* the appellant failed to raise the alleged error at the trial court level and thereby waived the error for purposes of appellate review. Similarly, in this case, Cummings did not object during the trial court's admonishment colloquy with Cummings, nor did he object at the time the trial court stated, "Based upon your plea of guilty, and based upon the evidence offered in connection with that plea and beyond a reasonable doubt, I find you [Cummings] guilty of theft of property of the value of $20,000 or more but less than $100,000 as charged in the indictment." And, again, when the trial court asked whether there was "[a]ny reason in law [why] this sentence should not now be formally pronounced," Cummings' counsel responded, "Not at this time, your Honor." The objection raised on appeal was not, therefore, raised before the trial court and was thereby waived. *Cf. Teixeira*, 89 S.W.3d at 192; *Washington v. State,* 71 S.W.3d 498, 499 (Tex. App. – Tyler 2002, no pet.).

Moreover, as is clear from the plea colloquy between Cummings and the trial court, the trial court did give consideration to the possibility of granting community supervision in this case. Ultimately, though, the trial court decided that the facts of the case did not merit such leniency. After discussing the facts presented in this case, the court stated, "But I'm not granting probation under these facts and for the person that stands before this bench." Accordingly, even had Cummings' point of error been preserved for appellate review, the record before us refutes the contention that the trial court arbitrarily failed to consider the full range of punishment. *Cf. Davis v. State,* 125 S.W.3d 734, 736 (Tex. App. – Texarkana 2003, no pet.) (trial court acknowledged on record it would consider accused's application for community supervision).

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jack Carter
Jack Carter
Justice

Date Submitted: February 22, 2005
Date Decided: March 23, 2005

Publish

APPENDIX B

JUDGMENT OF TRIAL COURT, MAY 21, 2004

No. 30959-B

THE STATE OF TEXAS	IN THE 124th District Court
VS.	OF
SHAWN MARCUS CUMMINGS	GREGG COUNTY, TEXAS

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT WAIVER OF JURY TRIAL

(Filed May 21, 2004)

Judge Presiding: KHOURY, ALVIN G.	Attorney for State: KATIE NIELSEN
Date of Judgment: 05/21/04	Attorney for Defendant: CLEMENT DUNN

Offense Convicted of: THEFT OF PROPERTY OF THE VALUE OF MORE THAN $20,000.00 BUT LESS THAN $100,000.00

Statute for Offense: ARTICLE 31.03(e)(5) PENAL CODE

Offense Date: March 1st, 2003 Degree: 3rd Degree Felony

Applicable Punishment Range:

TDCJ-ID 2 YRS-10YRS/MAX $10,000 FINE

Plea: Guilty Charging Instrument: Indictment
Verdict: GUILTY

Terms of Plea Bargain: NONE

Plea to Enhancement: NONE	Findings on Use Of Deadly Weapon: N/A
Findings on Enhancement: NONE	Other Affirmative Special Findings: NONE

Punishment and Place Of Confinement:
SEVEN (7) YEARS TDCJ-ID
Restitution: NONE
Name & Address for Restitution:
Texas Department of Criminal Justice Parole Division

Sentence Date: 05/21/04
Date to Commence: 05/21/04

Time Credited: 2 DAYS SERVED Attorney Fees: $0.00
Court Costs: $211.75

Sex Offender Registration: NO
Age of Victim:

CONCURRENT UNLESS SPECIFIED

JUDGMENT

The Defendant having been indicted in the above entitled and numbered cause for the felony offense of THEFT OF PROPERTY OF THE VALUE OF MORE THAN $20,000.00 BUT LESS THAN $100,000.00 and this cause being this day called, the State appeared by her assistant Criminal District Attorney KATIE NIELSEN, and the Defendant SHAWN MARCUS CUMMINGS, appeared in person and his counsel CLEMENT DUNN, also being present and both waived his right of trial by jury, such waiver being with the consent and approval of the Court and now entered of record on the minutes of the Court and such waiver being with the consent and approval of the Criminal District Attorney of Gregg County, Texas, in writing, signed by him, and filed in the papers of this cause before the Defendant entered his plea herein, the Defendant was duly arraigned and in open Court pleaded Guilty to the charge contained in the indictment; thereupon

the Defendant was admonished by the Court of the consequences of the said plea and the Defendant persisted in entering said plea, and it plainly appearing to the Court that the Defendant is mentally competent and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his guilt, the said plea was accepted by the Court is now entered of record as the plea herein of the Defendant. The Defendant in open Court, in writing, having waived the reading of the indictment, the appearance, confrontation, and cross-examination of witnesses, and agreed that the evidence may be stipulated and consented to the introduction of testimony by affidavits, written statements of witnesses and any other documentary evidence, and such waiver and consent having been approved by the Court in writing and filed in the papers of the cause; and the Court having heard the Defendant's waiver of the reading of the indictment, the Defendant's plea thereto, the evidence submitted, and the argument of counsel, is of the opinion from the evidence submitted that the Defendant is guilty as charged.

IT IS THEREFORE ADJUDGED BY THE COURT, that the said Defendant is guilty of the felony offense of THEFT OF PROPERTY OF THE VALUE OF MORE THAN $20,000.00 BUT LESS THAN $100,000.00 as found by the Court, that the said Defendant committed said offense on March 1st, 2003, that the punishment is hereby assessed at SEVEN (7) YEARS TDCJ-ID confinement in the Institutional Division Texas Department of Criminal Justice, that the Defendant be punished in accordance with same and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended, for which execution will issue.

THEREUPON the said Defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him, and he answered nothing in bar thereof, and it appearing to the Court that the Defendant is mentally competent and understanding of the English language, the Court proceeded in the presence of said Defendant, his counsel also being present, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, that the said Defendant, who has been adjudged by the Court to be guilty of THEFT OF PROPERTY OF THE VALUE OF MORE THAN $20,000.00 BUT LESS THAN $100,000.00 and whose punishment has been assessed by the Court at confinement in the Institutional Division of the Texas Department of Criminal Justice for SEVEN (7) YEARS TDCJ-ID, be delivered by the Sheriff of Gregg County, Texas, immediately, to the Director of the Texas Department of Criminal Justice or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division of the Texas Department of Criminal Justice for SEVEN (7) YEARS TDCJ-ID in accordance with the provisions of the law governing the Texas Department of Criminal Justice, and the Defendant is remanded to jail until said Sheriff can obey the direction of this sentence.

It is further ADJUDGED AND DECREED, by this Court that the sentence pronounced herein shall begin this date, and that the Defendant is granted 2 days credit for time serve in jail.

NOTICE OF APPEAL: given /s/ Alvin G. Khoury
JUDGE PRESIDING

May 21, 2004
DATE SIGNED

COURT ORDERED FINGER-PRINTING OF DEFENDANT'S RIGHT THUMB DONE IN OPEN COURT (ART 38.33 TCCP)

[Fingerprint Omitted]

/s/ Shawn Cummings

APPENDIX C

NOTICE FROM THE COURT OF
CRIMINAL APPEALS OF TEXAS
DENYING PETITION FOR DISCRETIONARY REVIEW

OFFICIAL NOTICE FROM COURT
OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

9/14/2005
COA#: 06-04-00124-CR
RE: Case No. PD-0730-05
STYLE: CUMMINGS, SHAWN MARCUS

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

Clement Dunn
140 East Tyler
Suite 240
Longview, TX 75601

APPENDIX D

TEXAS STATUTES AND RULES

TEXAS STATUTES AND RULES

TEX. CODE CRIM. PROC. provides, in relevant parts:

Article 1.04:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunity, or in any manner disenfranchised, except by the due course of the law of the land.

Article 26.13:

(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:

(1) the range of the punishment attached to the offense . . .

Article 42.12:

§3. Judge Ordered Community Supervision

"(a) A judge, in the best interest of justice, the public, and the defendant, after conviction or a plea of guilty or nolo contendere, may suspend the imposition of the sentence and place the defendant on community supervision or impose a fine applicable to the offense and place the defendant on community supervision.

. . .

§5. Deferred Adjudication; Community Supervision

(a) . . . when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving the plea of guilty or nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering

an adjudication of guilt, and place the defendant on community supervision.

. . .

(c) On expiration of a community supervision period imposed under Subsection (a) of this section, if the judge has not proceeded to adjudication of guilt, the judge shall dismiss the proceedings against the defendant and discharge him . . . a dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense . . .

TEX. PENAL CODE, provides in relevant parts:

§12.34:

(a) An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment in the institutional division for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $10,000.

§31.03:

(a) A person commits an offense if he unlawfully appropriates property with the intent to deprive the owner of property.

. . .

(e) . . . an offense under this section is:

. . .

(5) a felony of the third degree if the value of the property stolen is $20,000 or more but less than $100,000 . . .

TEX. R. APP. PROC. provides, in relevant part:

Rule 33.1 Preservation; How Shown

(a) *In general.* As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

. . .

APPENDIX E

EXCERPTS FROM REPORTER'S RECORD

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 30,959-B

THE STATE OF TEXAS	)	IN THE DISTRICT COURT
vs.	)	GREGG COUNTY, TEXAS
SHAWN MARCUS CUMMINGS	)	124TH JUDICIAL DISTRICT

GUILTY PLEA

On the 21st day of May, 2004, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Alvin G. Khoury, Judge Presiding, held in Longview, Gregg County, Texas.

Proceedings reported by computerized stenotype machine.

* * *

[8] THE DEFENDANT: I'm pleading guilty, your Honor.

THE COURT: Upon your plea of guilty I must find you guilty. I cannot find you not guilty if you plead guilty; do you understand that?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: Once I make that finding of guilt, the law requires that I assess your punishment to confinement in the Institutional Division of the Texas Department of Criminal Justice, that's the state penitentiary,

for a period of not less than two years, no more than ten years.

In addition to any period of confinement, I may impose a fine up to $10,000. You understand that is the range of punishment fixed by law for this type of offense?

THE DEFENDANT: Yes, I do.

* * *

THE COURT: Okay. You have the right to file an application for a probated sentence. I note that you've done that. I tell you that you having filed that [9] application, the law requires, and I will, in fact, consider it, but I'm under no duty, no obligation, no commitment to anyone to grant probation in this matter; do you understand that?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: If probation is granted, I get to set its terms and conditions, including its length, which may be as little as two years, may be as many as ten years.

Also, if I grant probation, and I don't know whether I am or not, I could impose a special condition that you serve what we call some up-front time in the county jail, up to 90 days – well, up to 180 days in the county jail.

Do you understand the Court sets the terms and conditions of probation if probation is granted?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: If a person is placed on probation and it's later charged that they violated any term or condition of that probation, that results in a hearing being

held in this court. That will be before the Judge, there won't be any jury involved in that process.

The Judge will hear the evidence at that time, and after hearing the evidence, the Judge will decide has there been a violation or violations. And if the Judge finds there has been, the Judge, the Judge alone, decides [10] what, if anything, to do about it. Do you understand that's how it works?

THE DEFENDANT: Yes, I do, your Honor.

THE COURT: If a person is placed on probation and their probation is later revoked, they're given credit on that sentence for any time spent in jail in connection with the case: That period of time from the date of the initial arrest charged by the indictment until the entry of the guilty plea today; any time spent in jail as a condition of probation; and any time spent in jail awaiting either a hearing or hearings on an application or applications to revoke; do you understand?

THE DEFENDANT: Yes, I do.

THE COURT: Is there any type of a plea bargain agreement in this matter?

MS. NIELSEN: No, your Honor.

MR. DUNN: No, your Honor, there's not.

THE COURT: Is there any type of agreement or understanding by and between counsel for the State, counsel for the accused, and the accused himself that in any way conceivably could be construed as a plea bargain agreement?

MS. NIELSEN: There is not.

MR. DUNN: Your Honor, for the record, I always explain to my clients who have cases in this court what this Court's policy and philosophy are and have been [11] for many years with regard to the concept of plea bargaining, and my client understands that, and no, your Honor, there is nothing that could be construed in that fashion.

THE COURT: Is this, then, truly an open plea of guilty to this Court?

MS. NIELSEN: It is.

MR. DUNN: It is.

THE COURT: Now, what that means, Mr. Cummings, is after the evidence is presented, the lawyers may make recommendations to me as to what I ought to do in this matter. I don't know what those recommendations are. I will listen to them, but the bottom line is, they in no way bind me.

And if I choose not to follow the recommendation made to me, if I choose to impose a sentence higher than what is recommended, you don't get to back off and withdraw your guilty plea, because there is no plea agreement; do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Now, understanding that is the procedure, do you want to continue your plea or not?

THE DEFENDANT: Yes, I do.

* * *